



# Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108  
phone: 617-727-0060, fax: 617-723-5851



SUFFOLK, ss.

COMMISSION ADJUDICATORY  
DOCKET NO. 524

## IN THE MATTER OF KEVIN B. KINSELLA

Appearances: Karen Gray, Esq.  
Counsel for Petitioner

Thomas E. Finnerty, Sr., Esq.  
Counsel for Respondent

Commissioners: Brown, Ch., McDonough, Burnes, Larkin and Rapacki

Presiding Officer: Commissioner Paul F. McDonough, Jr., Esq.

### DECISION AND ORDER

#### **I. Procedural History**

On May 10, 1995, the Petitioner initiated these proceedings by issuing an Order To Show Cause ("OTSC") pursuant to the Commission's Rules of Practice and Procedure. 930 CMR § 1.01 (5)(a). The OTSC alleges that Kevin B. Kinsella, while serving as a selectman in the Town of Scituate, violated G.L. c. 268A, §23(b)(2) by attempting to use his official position as selectman to secure for his son the unwarranted privilege and exemption from arrest, bail and prosecution for a charge of operating a motor vehicle under the influence of intoxicating liquor (OUI). The Petitioner has charged that Kevin Kinsella attempted to use his position as a selectman to secure for his son the privilege or exemption from arrest, bail, and prosecution by contacting the chief of police to obtain his son's release from custody and to give Kevin Kinsella "professional courtesy" in relation to his son's arrest.

The Respondent filed an Answer in which he generally denied the charge, except he admitted that Stephen Kinsella is his son and he further answered that the Scituate Police Department violated his son's constitutional rights by failing to contact a bail commissioner in a timely manner and failing to allow his son to obtain a blood test in a timely manner. He also asserted that he was merely seeking the release of his son on the night of his arrest; that his son was acquitted of the charges; and that the usual disposition by a court for a first time offender is probation for one year and attendance at an alcohol education program, after which the charges are dismissed. The Respondent did not assert any affirmative defenses.

An adjudicatory hearing was held on December 7, 8 and 18, 1995.<sup>1/</sup> At the conclusion of the evidence, the parties were invited to submit legal briefs to the full Commission. 930 CMR § 1.01(9)(k). The Petitioner submitted a brief on March 27, 1996. The Respondent submitted a brief on June 10, 1996. The parties presented their closing arguments before the Commission<sup>2/</sup> on August 8, 1996. 930 CMR 1.01(9)(e)(5). Deliberations began in executive session on August 8, 1996. G.L. c. 268B, §4(i); 930 CMR 1.01(9)(m)(1). Deliberations were concluded on October 15, 1996.

#### **II. Findings of Fact**

1. Between 1991 and the present, Kevin Kinsella has served as an elected selectman in the Town of

Scituate. Among their duties, the Board of Selectmen review the police department budget, make general policies regarding the police department, and hire the town administrator. The town administrator hires the police chief.

2. Stephen Kinsella is Kevin Kinsella's son.

3. At approximately 3:00 a.m. on May 11, 1992, Stephen Kinsella was arrested by the Scituate police for OUI and failure to stay in lanes.

4. Shortly after the arrest, Mr. Kinsella learned his son was arrested when he received a call from his son at the police station. As a result of this telephone call, Kevin Kinsella went to the Scituate police station. He spoke with Officer Bud Thorn who was the officer at the desk that night and he asked Officer Thorn if he could see his son.

5. Officer Thorn introduced him to the arresting officer, Officer Whittier. Mr. Kinsella did not approach Officer Whittier and request that he drop the charges.

6. Officer Thorn offered to and did bring Stephen to see his father. Mr. Kinsella asked Officer Thorn if he could take his son home, but Officer Thorn informed him that the police could not release his son as the bail commissioner refused to come to the police station after 11:30 at night, and a person who had been arrested could not be released until bail was set.

7. Officer Thorn suggested that Chief Nielen might let Kinsella take his son home and asked Mr. Kinsella if he wanted Thorn to call the chief. Officer Thorn called the chief and informed him of Stephen Kinsella's arrest, and that Mr. Kinsella was at the station and wanted to talk to the chief.

8. Chief Nielen called the station and spoke with Mr. Kinsella. Kinsella asked the chief if he could take his son home and he asked if he could bail his son. The chief informed Mr. Kinsella that the bail commissioner would not come out after 11:30 at night, so Kinsella's son would have to stay in the jail until the morning.

9. On May 11, 1992, Mr. Kinsella did not ask Chief Nielen to drop the charges pending against his son.

10. Later May 11, 1992, Stephen Kinsella was taken by the Scituate Police to the District Court where he was arraigned on the charges of OUI and failure to stay in lanes and released on personal recognizance.

11. In the afternoon of May 13, 1992, Kevin Kinsella called Chief Nielen from the Scituate selectman's office and requested a meeting with the chief.<sup>3/</sup> According to Mr. Kinsella's testimony, he was concerned with publicity and did not want to meet the chief at the police station or in the selectman's office.<sup>4/</sup> Prior to May 13, the arrest had not been publicized and Kinsella hoped that there would continue to be no publicity surrounding his son's arrest.

12. Kinsella and the chief agreed to meet at the Cole Parkway, a large parking area at the harbor, in the center of Scituate. The meeting was held in Kinsella's car and lasted between forty-five minutes and one hour. Kinsella requested that the meeting be "confidential and off the record" because of his concern about publicity.

13. Among the things discussed at the May 13 meeting were Kinsella's displeasure that his son had not been released on bail on the night of the arrest, that Kinsella believed that this refusal to call the bail commissioner violated his son's constitutional rights, and that the Scituate police were violating the bail laws. Mr. Kinsella was concerned that the Town might be subject to civil liability in the future if the police department continued its bail practices.

14. Kinsella asked Chief Nielen for "professional courtesy". According to Mr. Kinsella's testimony, in using the term "professional courtesy", his intent was to seek the police chief's assistance in keeping his son's arrest from being publicized in the media.<sup>5/</sup>

15. By the end of the conversation, Chief Nielen believed, by Kinsella's use of the term "professional courtesy", that Mr. Kinsella wanted him to intercede in his son's case or to drop the charges. Chief Nielen believed that Kevin Kinsella was very disappointed with how his son's case had been handled by the police.<sup>6/</sup>

16. Kinsella did not explicitly ask the police chief to drop the charges against his son or to speak to the District Attorney about the charges or to intervene in the court proceedings against his son. Chief Nielen did not intercede in the arrest, bail, or prosecution of Stephen Kinsella.

### III. Decision

#### A. Jurisdiction

As a preliminary matter we must decide whether, at the relevant time, Mr. Kinsella was a municipal employee<sup>7/</sup> subject to G.L. c. 268A. In his Answer, the Respondent admitted that he is a selectman in the Town of Scituate, but, he denies, without explanation, that he is a municipal employee.

We conclude, as a matter of law and fact, that, at all times relevant, Mr. Kinsella was a municipal employee. Clearly under G.L. c. 268A, §1 a selectman is a person “performing services for or holding an office in a municipal agency”. By statute, G.L. c. 41, §1 includes the position of selectman as a town officer. Finally, in *Board of Selectmen of Avon v. Linder*, 352 Mass. 581 (1967), the Supreme Judicial Court, within the context of reviewing a violation under the precursor to §23(b)(2), stated “[t]he defendant as a member of the Board of Selectmen, the highest town office, is a municipal officer or employee within the meaning [of §23].” *Id.* at 583.

#### B. Section 23(b)(2)

G.L. c. 268A, § 23 contains the “standards of conduct” applicable to all state, county, and municipal employees. Section 23(b)(2), in relevant part, provides that “No current officer or employee of a ...municipal agency shall knowingly, or with reason to know, use or attempt to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals.” Under 930 CMR § 1.01 (9)(m)(2), in order to establish a violation of G.L. c. 268A, the Commission must find that the Petitioner has proven its case by a preponderance of the evidence.<sup>8/</sup>

##### 1. Conversation Of May 11, 1992

The Commission finds that there is not a preponderance of the evidence (direct or circumstantial) that Mr. Kinsella attempted to use his position to obtain an unwarranted privilege or exemption from arrest or bail for his son on the evening of May 11, 1992. We find credible Mr. Kinsella’s testimony that Officer Thorn, not Kinsella, suggested that the chief be contacted. The Petitioner has not provided evidence to dispute this fact and Police Chief Nielen confirmed that Officer Thorn placed the telephone call. The chief also testified that he had previously received telephone calls at home from concerned parents and that he considered Kinsella, that night, to be a concerned parent.

There is also no evidence to show that Kinsella directly or indirectly asked either the arresting officer or the chief to drop the charges on the evening of May 11, 1992. Nor is there evidence that he requested that the police bypass proper bail procedures. Kinsella’s unrefuted testimony was that he wanted to pay whatever bail would be set for his son so that he could take his son home.

##### 2. Conversation Of May 13, 1992

We must determine whether Kinsella, by holding a private conversation with the police chief regarding his son’s arrest, knowingly or with reason to know attempted to use his selectman’s position to obtain an unwarranted privilege or exemption for his son. In our review of all of the evidence, we acknowledge that this is a very close case. This case does not present the situation of a direct request for a favor. Rather, we must weigh the testimony of the two individuals who were the participants in the conversation at issue.

We find that Police Chief Nielen was sincere and credible in his belief and interpretation of the conversation he had with Mr. Kinsella on May 13, 1992. He believed that the Respondent was requesting the police chief’s intervention and leniency in the criminal proceedings against Stephen Kinsella.<sup>9/</sup>

However, we also find that Kevin Kinsella was credible in his testimony regarding the reasons he requested

a conversation with the police chief. We find that the Respondent was concerned about and wanted to minimize the publicity surrounding his son's arrest. We find, based on Kinsella's testimony, which we credit, that Kinsella's intent in initiating the conversation with the police chief was not to influence his son's case, but rather, as a father, to defend his son, and, as a selectman, to criticize the bail practices of the Scituate Police Department and to share his concerns that the bail laws were being violated by the Scituate Police.<sup>10/</sup>

Because we find both witnesses to the conversation to be credible, we conclude that the Petitioner has not met the preponderance of the evidence standard in this case. The Petitioner cannot prevail "if the question is left to guess, surmise, conjecture or speculation, so that the facts established are equally consistent [with no violation as with a violation]". *Tartas' Case*, 328 Mass. 585 (1952).

Although we do not conclude that the Petitioner has proved its case, we do not condone the Respondent's conduct, which can best be described as extremely poor judgment under the circumstances. The Respondent's conduct suggested an abuse of power which, at the time, warranted investigation by this Commission.

#### IV. Conclusion

After weighing the evidence, a majority of the Commissioners conclude that the Petitioner has not proven, by a preponderance of the evidence, that Mr. Kinsella violated G.L. c. 268A, §23(b)(2) in his conversations with the Scituate police chief.

**DATE: October 15, 1996**

<sup>1/</sup>Commissioner McDonough was the duly designated presiding officer in this proceeding.

<sup>2/</sup>Present at the closing arguments were Commissioners Brown, McDonough, Larkin, and Rapacki. The closing arguments were stenographically recorded, and Commissioner Burnes was provided with and read the transcript of the closing arguments. She participated in the deliberations and decision of this case. In rendering this Decision and Order, each of the Commissioners has considered the testimony, evidence and argument of the parties.

<sup>3/</sup>We find Kevin Kinsella credible in his testimony regarding the date of this meeting. Chief Nielsen's best recollection was that this meeting was a couple of weeks after the arrest. Chief Nielsen made an entry in his diary of a meeting approximately May 27, 1992, but did not make the entry contemporaneously with the event. Kinsella's memory of the dates is supported by the testimony of Selectmen Andrew Zilonis and Donald Brown who testified that, prior to May 24, 1992, Kinsella had a private meeting with each of them and told each of them that he had met with the chief.

<sup>4/</sup>We find credible Kinsella's testimony.

<sup>5/</sup>We find credible Kinsella's testimony.

<sup>6/</sup>We find credible Chief Nielsen's testimony.

<sup>7/</sup>G.L. c. 268A, §1(g) defines "municipal employee" as a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. G.L. c. 268A, §1(g).

<sup>8/</sup>The Supreme Judicial Court has defined the preponderance of the evidence standard as follows:

The weight or ponderance of evidence is its power to convince the tribunal which has the determination of the fact, of the actual truth of the proposition to be proved. After the evidence has been weighed, that proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may linger there.

*Sargent V. Massachusetts Accident Company*, 307 Mass. 246, 250 (1940); see also *Callahan v. Fleischman*, 262 Mass. 437, 438 (1928) (in civil case, trier should be satisfied "if, after fairly weighing the conflicting evidence, he feels sure that his finding is supported by a greater weight of trustworthy evidence than is opposed to it").

<sup>9/</sup>At the time of the May 13, 1992 conversation, the bail and arrest of Stephen Kinsella was not at issue as he had been arraigned in the District Court and had obtained bail. The judicial proceedings were pending against Stephen.

<sup>10/</sup>Kevin Kinsella admitted that he has never taken any official action in a public forum as a selectman to address the bail issues in Scituate, but he testified credibly that he thought it would be inappropriate to address such issues while his son's case was pending in the court.